

Testimony of

Nancy D. Polikoff and Gay and Lesbian Activists Alliance of Washington (GLAA)

On

"Paid Sick and Safe Days Act of 2007," Bill 17-197

D.C. City Council Committee on Workforce Development and Government Operations

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My name is Nancy D. Polikoff. I am a Professor of Law at American University Washington College of Law, where I have taught Family Law for more than 20 years. Formerly, I supervised family law programs at the Women's Legal Defense Fund (now the National Partnership for Women and Families) and before that I was in private practice. I am a D.C. resident, and I have been a member of the District of Columbia Bar since 1975. I have written a book about how the law can value all family relationships entitled, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, which is being published by Beacon Press and will come out in February 2008.

I am testifying today on behalf of myself and the Gay and Lesbian Activists Alliance of Washington (GLAA).

I commend the Councilmembers for their leadership on requiring paid sick leave days for those who work in the District of Columbia. I strongly support the legislation. The bill under consideration permits employees to use their sick leave for their own illnesses or to care for a sick "family member." I am testifying today to urge a revision in the definition of "family member" in the statute.

I urge two basic changes: 1) those who register as domestic partners should be treated identically to those who marry; and 2) those who work for the employers covered by this statute should have the same right that federal government employees currently have to use their sick leave to care for "any individual related by blood or affinity whose close association with the employee is the equivalent of a

family relationship." The federal government does not require that those who meet this definition live together at all, let alone live together for 12 months as provided in Section 2 (3)(C) of the bill before this Committee.

I. Domestic Partners

The Council's Committee on Public Safety and the Judiciary is in the process of revising numerous D.C. statutes to ensure that those who register as domestic partners are treated as the law currently treats spouses. The definition of "family member" in Bill 17-197, Section 2(3) (A), encompasses those related by "marriage;" the word "spouse" appears in Section 3 (c) (3). In the final bill, any reference to "marriage" should be followed by "domestic partnership," and any reference to spouse should be followed by "domestic partner."

II. Other family members

In 1994, Congress passed the "Federal Employees Family Friendly Leave Act," requiring the federal government to allow employees to use sick leave to care for the medical needs of family members and giving the Office of Personnel Management the authority to define "family member." 5. U.S.C. 6307[e](d)(1). After notice and comment, later that year the agency implemented a broad definition of family member that includes "**any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.**"

5 CFR 630.201 (emphasis added).

<https://www.opm.gov/oca/leave/HTML/12week.asp> (attached to this testimony).

The Final Rule specifically noted its intent to have a broad definition of family member. 59 Fed. Reg. 62266, 62267 (Dec. 2, 1994). See *also* 65 Fed. Reg. 37234 (June 13, 2000).

Given this federal government policy in effect for more than a decade, it is unsurprising that legislation currently pending in both houses of Congress, mandating paid sick leave for private employees, also contains this language in its

definition of "family member." The bill is called the *Healthy Families Act*. It has 22 co-sponsors in the Senate. Section 5 (d) reads as follows:

Sick leave accrued under this section may be used by an employee for any of the following:

- (1) An absence resulting from a physical or mental illness, injury, or medical condition of the employee.
- (2) An absence resulting from obtaining professional medical diagnosis or care, or preventive medical care, for the employee subject to the requirement of subsection (e).
- (3) An absence for the purpose of caring for a child, a parent, a spouse, or **any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship**, who--
 - (A) has any of the conditions or needs for diagnosis or care described in paragraph (1) or (2); and
 - (B) in the case of someone who is not a child, is otherwise in need of care.

Healthy Families Act, 110th Cong., 1st sess., S910/ HR 1542, sec. 5(d)(3) (emphasis added).

I urge the Council to include this language – covering “any other individual related by blood or affinity whose close relationship with the employee is the equivalent of a family relationship” -- in the Paid Sick and Safe Days Act. There are numerous forms of family in the District of Columbia. A variety of D.C. laws recognize unmarried couples, close friends, and children’s caregivers, regardless of formal relationship.

Perhaps most significantly for this legislation, D.C. law – in accordance with best practices -- authorizes “close friends” to make health care decisions for those who lack the capacity to make their own health care decisions. D.C. Code § 21-2210 (a) (5B) and (e); D.C. Code § 21-2202 (1A). For obvious reasons, such relationships should fall within the definition of those entitled to use their own sick leave to attend to one another.

The Paid Sick and Safe Days Act recognizes that employees should be able to use their own sick leave to care for ailing family members. A purpose of the proposed law is easing the tension that employees face when their employment

conflicts with their care giving responsibilities. The bill also assures that those who are vulnerable because of their medical condition, and who must rely on others for care, can call upon those who love them to provide this needed care.

The federal *Healthy Families Act* includes the following findings that are relevant to how family member is defined:

Sec 2.

(1) Working Americans need time to meet their own health care needs and to care for family members, including their children, spouse, parents, and parents-in-law, and other children and adults for whom they are caretakers.

(5) Providing paid sick leave improves public health by reducing infectious disease. Policies that make it easier for sick adults and children to be isolated at home reduce the spread of infectious disease.

(7) The provision of individual and family sick leave by large and small businesses, both here in the United States and elsewhere, demonstrates that policy solutions are both feasible and affordable in a competitive economy. Measures that ensure that employees are in good health and do not need to worry about unmet family health problems help businesses by promoting productivity and reducing employee turnover.

To accomplish these purposes, legislation should define "family members" broadly enough to capture all family relationships, without regard to their formal designation, as the federal regulation does. Unmarried partners should not have to marry, register, live together, or live together for a minimum period of time in order to provide or receive care using the employee's sick leave. Godparents and others with close, caretaking relationships with children should be able to use their own sick leave to care for these children when they are ill. Long-time friends who function as family members to each other should be able to care for each other in times of need. As currently written, second cousins who see each other infrequently would be qualified to take sick leave when one is ill because they are "related by blood," but friends whose lives are intertwined on a daily basis would not be.

For lesbian, gay, bisexual and transgender people, a broad definition of “family member” is especially critical. LGBT people may be more likely than others to move away from their families of origin to a part of the country – like the District of Columbia – that welcomes them and protects their civil rights. Once here they form enduring bonds; sociologists refer to their “family of friends.” The regulation governing use of sick leave by federal employees encompasses these relationships.

In preparing for this testimony, I reviewed the research I conducted for my forthcoming book. I found the example of Robert, an attorney with the federal government, who received permission to use more than three weeks of sick leave to care for his male partner’s mother with terminal cancer. The definition included in the Paid Sick and Safe Days Act of 2007 should ensure that if Robert worked for a private employer in D.C. he would also be able to use his sick leave for such care.

Consider, in addition, these examples, all based on the lives of people I know.

Luisa’s mother is 81 and has lived with Ricardo, who is 83, for many years. They are not married. Luisa considers him her step-father. Ricardo has Alzheimer’s disease; Luisa’s mother is too frail to care for him. Under the proposed bill, Luisa could not use her own sick leave to care for Ricardo. If Luisa were a federal government employee, she would be able to do so.

Barbara has taken care of Alex, the son of her close friend and former partner, Agnes, every Wednesday since he was born. He is now 10 years old. He calls her “Auntie Barbie.” Alex has chicken pox and must stay home from school. Under the proposed bill, Barbara could not use her own sick leave to care for Alex. If Barbara were a federal government employee, she would be able to do so.

Winona and Francine, a lesbian couple, have lived together for more than 10 years, and Francine helped raise Winona’s two children, Andre and Jacob. Jacob is 23 and no longer lives with them. Francine was hospitalized as a result of a car accident, and although she is home from the hospital she needs constant care

because she cannot get into or out of bed by herself. Under the current bill, Jacob could not use his own sick leave to stay with Francine. If Jacob were a federal government employee, he would be able to do so.

Steven and Bob recently celebrated their 20 year anniversary in the company of their families and friends, all of whom recognize them as a couple. Although they travel together and spend weekends together, they live in separate apartments. Under the current bill, neither could use his sick leave to care for the other. If either were a federal government employee, he would be able to do so.

Employers have legitimate needs that must be balanced against their employee's care giving responsibilities. The main tool to achieve that balance, however, should *not* be a limitation on how "family" is defined.

I urge this Committee to replace Section 2(3) of the Paid Sick and Safe Days Act of 2007 with the following language, based upon the definition in the proposed federal Healthy Families Act, with two additions:

"Family member" means:

(A) a child, parent, spouse, domestic partner, or member of the household of the employee; or

(B) any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

This definition adds "domestic partner," because the DC Code should always equate domestic partners and spouses. It adds "member of the household" because it is a clear measure. While such individuals would be expected to meet the definition in section **(B)**, inclusion in section **(A)** avoids the need for employers and employees to apply the broader definition in a substantial number of instances.

Thank you for this opportunity to testify on this important bill. I would be happy to assist the Committee at any time.

This page can be found on the web at the following url:
<http://www.opm.gov/oca/leave/HTML/12week.asp>

U.S. Office of Personnel Management
Ensuring the Federal Government has an effective civilian workforce

Sick Leave to Care for a Family Member with a Serious Health Condition

Entitlement

Most Federal employees may use a total of up to 12 administrative workweeks of sick leave each leave year to care for a family member with a serious health condition. If an employee previously has used any portion of the 13 days of sick leave for general family care or bereavement purposes in a leave year, that amount must be subtracted from the 12-week entitlement. If an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care purposes. An employee is entitled to a total of 12 weeks of sick leave each year for all family care purposes.

Definition of Family Member

"Family member" is defined as--

- spouse, and parents thereof;
- children, including adopted children, and spouses thereof;
- parents;
- brothers and sisters, and spouses thereof; and
- any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Serious Health Condition

The term "serious health condition" has the same meaning as used in OPM's regulations for administering the Family and Medical Leave Act of 1993 (FMLA). That definition includes such conditions as cancer, heart attacks, strokes, severe injuries, Alzheimer's disease, pregnancy, and childbirth. The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. The common cold, the flu, earaches, upset stomach, headaches (other than migraines), routine dental or orthodontia problems, etc., are not serious health conditions unless complications arise. The agency may require medical certification of a serious health condition.

Administration

At the discretion of the agency, an employee may be advanced a maximum of 30 days of sick leave (or a proportional amount for an employee on a part-time schedule or uncommon tour of duty) to provide care for a family member with a serious health condition.

References

5 CFR 630.401 and 630.1202

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